

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 2:10-cr-00399-MMD-GWF

Plaintiff,

v.

ORDER

PAUL WAGNER,

Defendant.

I. INTRODUCTION

On October 12, 2012, after trial of approximately two weeks, the jury returned a verdict of guilty on all 12 counts remaining in the Superseding Indictment against Defendant Paul Wagner. (ECF No. 122.) On October 19, 2015, Wagner, proceeding *pro se*,¹ filed a motion for a new trial based on newly discovered evidence, contending that the government failed to disclose *Brady* and *Giglio* materials² ("Motion"). (ECF No. 235.) The Court permitted additional briefing, including allowing the government to file a rejoinder and Wagner to file a response to the rejoinder ("Response"). (ECF Nos. 249, 258, 260, 268.) For the reasons discussed below, Wagner's Motion is denied.

II. RELEVANT BACKGROUND

Paul Wagner, a home builder, was indicted on one count of conspiracy to commit bank fraud and wire fraud, thirteen counts of bank fraud and three counts of wire fraud.

¹Wagner does not request appointment of counsel. Nor does the Court find that counsel should be appointed given the absence of any evidence offered in support of Wagner's Motion.

²At Wagner's request, the Court extended the deadline for Wagner to file his motion for a new trial. (ECF no. 238.)

(ECF No. 31.) Five counts (counts 8 through 12) were subsequently dismissed pursuant to the government's motion. (ECF No. 119.) The jury convicted Wagner of the remaining 12 counts for conduct that spanned over the course of two years and involved 85 transactions that affected over 30 lenders. The evidence at trial shows that Wagner inflated the value of the homes he built, utilized appraisers who gave false appraisals to support the sales prices, and offered cash incentives and kickbacks using funds from the loan proceeds to entice straw buyers, real estate agents and others to participate in a fraudulent scheme to allow him to sell his inventory of homes. Wagner then concealed these payments from lenders through payment to his Merrill Lynch account outside of escrow and through the use of third party disbursement companies to make mortgage payments on behalf of the straw buyers.

Wagner was indicted on July 28, 2010. (ECF No. 8.) Lawrence Semenza commenced representation of Wagner shortly thereafter on September 8, 2010. (ECF No. 16.) Trial commenced on September 25, 2012. (ECF No. 106.) The jury returned a guilty verdict on October 12, 2012. (ECF No. 122.) The Court granted substitution of counsel, terminating Semenza's representation of Wagner on January 1, 2013, before Wagner was sentenced. (ECF No. 142.) Judgment was entered on July 30, 2013. (ECF No. 169.)

Wagner seeks a new trial under Fed. R. Crim. P. 33(b)(1), discovery and an evidentiary hearing. (ECF No. 235.) The gist of Wagner's argument is that he has recently discovered new evidence that the government had failed to disclose in violation of its obligations under *Brady* and *Giglio*.

III. LEGAL STANDARDS

A. Motion for a New Trial

Pursuant to Federal Rule of Criminal Procedure 33(a), "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Rule 33(b) limits the ground of a motion for a new trial filed after 14 days but within 3 years to newly discovered evidence. The Ninth Circuit Court of Appeals in

1 *United States v Harrington*, 410 F.3d 598, 601 (9th Cir. 2005), reiterated a five-part legal
 2 test to examine a motion for a new trial grounded on newly discovered evidence. See
 3 also *United States v. Hinkson*, 585 F.3d 1247, 1264 (9th Cir. 2009) (en banc). Under that
 4 test, a defendant is required to show that “(1) the evidence must be newly discovered;
 5 (2) the failure to discover the evidence sooner must not be the result of a lack of
 6 diligence on the defendant's part; (3) the evidence must be material to the issues at trial;
 7 (4) the evidence must be neither cumulative nor merely impeaching; and (5) the
 8 evidence must indicate that a new trial would probably result in acquittal.” *Harrington*,
 9 585 F.3d at 601 (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)).

10 It is well established that “a defendant seeking a new trial on the basis of newly
 11 discovered evidence must show that “the evidence relied on is, in fact, newly discovered,
 12 i.e., discovered after the trial.” *United States v. McKinney*, 952 F.2d 333, 335 (9th Cir.
 13 1991) (quoting *Pitts v. United States*, 263 F.2d 808, 810 (9th Cir.), *cert. denied*, 360 U.S.
 14 919, (1959). Evidence that could have been obtained at any time or that was disclosed
 15 during trial does not satisfy the first factor of the *Harrington* five-factor test. See
 16 *Harrington*, 410 F.3d at 601 (finding that “photographs and street map [that] could have
 17 been obtained at any time” and testimony at a preliminary hearing that were captured on
 18 tape which could have been obtained by counsel during trial are not “newly discovered
 19 evidence”).

20 **B. The Government’s Obligations under *Brady* and *Giglio***

21 “[T]he suppression by the prosecution of evidence favorable to an accused upon
 22 request violates due process where the evidence is material either to guilt or to
 23 punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v.*
 24 *Maryland*, 373 U.S. 83, 87 (1963). Under *Brady*, a prosecutor must disclose evidence
 25 that is “material either to guilt or to punishment.” *Id.* In *Giglio v. United States*, the
 26 Supreme Court extended *Brady*’s disclosure requirement to evidence that may impeach
 27 a government witness. *Giglio*, 405 U.S. 150 (1972). A defendant asserting a *Brady/Giglio*
 28 violation must satisfy three requirements: “(1) the evidence at issue must be favorable to

1 the accused, either because it is exculpatory, or because it is impeaching; (2) that
2 evidence must have been suppressed by the State, either willfully or inadvertently; and
3 (3) prejudice must have ensued.” *United States v. Williams*, 547 F.3d 1187, 1202 (9th
4 Cir.2008) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, (1999) (internal quotation
5 marks omitted)).

6 **IV. DISCUSSION**

7 Wagner argues that the government failed to disclose the following evidence in
8 violation of its obligations under *Brady/Giglio*: (1) an email dated August 25, 2009, from
9 Alicia Hanna to Federal Bureau of Investigation Agent Mike Rawlins where Hanna
10 indicated she “would love to come work with you guys” (“the Email”); (2) Dennis Morales’
11 criminal history and agreement to cooperate with the government; and (3) the fact that
12 Roma Nelson was an undercover agent reporting to Rawlins and she had copied
13 documents from Wagner’s files for the FBI before she quit her job with his company,
14 Wagner Homes (ECF No. 235.) Wagner further argues that the government failed to
15 disclose that his counsel, Lawrence Semenza, was being investigated for tax evasion
16 during the time of Wagner’s trial. In his reply brief, Wagner added that the government
17 failed to disclose to the jury the “truth character” of witnesses such as Pachinger and
18 Weissbuch who were “de facto government agent[s]”; and failed to disclose that Beverly
19 Antonio, who was presented as an “independent and unbiased witness,” had been a
20 cooperating witness and was “inserted into Wagner’s business” by the FBI to set him up,
21 and concealed Antonio’s past fraudulent conduct. (ECF No. 235 at 8-15.)

22 As an initial matter, the Court agrees with the government that several of the
23 arguments raised in Wagner’s reply and Response are not relevant to the single ground
24 supporting his Motion — his contention that newly discovered evidence shows the
25 government failed to comply with its *Brady/Giglio* obligations. For example, Wagner
26 contends that the government “glossed over Mr. Morales’s considerable criminal history
27 and left the jury with a small but nevertheless damaging implication of Paul Wagner’s
28 propensity to use fraudulent means to obtain financing for the purchasers of his homes.”

(ECF No. 268 at 8.) Another example is Wagner's contention that the government failed to provide notice of its intent to introduce testimonies of Russell Pachinger and Joshua Weissbuch about their roles in the fraudulent scheme. (ECF No. 258 at 8.) These arguments may raise issues relating to Wagner's direct appeal, but they are not pertinent to Wagner's contention that the government failed to disclose exculpatory evidence or impeachment evidence in violation of *Brady/Giglio*. The Court will therefore not address these ancillary irrelevant arguments. The Court will instead focus on Wagner's contention that the government failed to disclose material information relating to certain witnesses and his counsel.

1. Alicia Hanna

While Wagner's Motion contends that the government failed to disclose the Email, Wagner acknowledges in his Response that the Email was disclosed.³ (ECF No. 268 at 3.) However, Wagner argues that the government had an obligation to highlight the Email when producing it during discovery. Wagner offers no authority to support his argument that the government has an obligation to point out certain discovery documents as more important than others. Moreover, the government has demonstrated that the Email was produced as part of a group of other emails in .pdf format that was searchable with commercially available software and was not buried among dissimilar documents. (ECF No. 260 at 2-3; ECF No. 260-2.) Wagner has failed to show that the government violated its obligations under *Giglio* in the manner in which the Email was produced in discovery.

2. Dennis Morales

Wagner contends the government failed to disclose that Morales had a criminal history, that his appraisal license had been revoked in April 2005, that he had an agreement to act as an agent of the FBI, that he was fitted with a wire to record
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³In its response, the government offered evidence that the Email was produced in discovery three months before trial. (ECF No. 249-1 at 2-4.)

1 conversations with Wagner and others such as Mark Gonzales,⁴ and that he had
2 provided information concerning another builder named Mr. Virgil. (ECF No. 235 at 3, 9-
3 10.) The government counters that it disclosed (1) information about Morales' criminal
4 history and uncharged conduct (ECF No. 249-1 at 17-18; ECF No. 249-2 at 2-7, 13-17;
5 ECF No. 249-3 at 2-13, 21-27); (2) information that Morales had cheated his former
6 employer and had relinquished his appraisal license in 2005 (ECF No. 249-2 at 2); (3)
7 the existence of recordings between Morales and Gonzales in the March 23, 2012,
8 letter, but that letter does not identify recordings between Morales and Wagner or
9 Morales and others as Wagner claims in his Motion (ECF No.-249 at 5; ECF No. 249-3
10 at 15-19); (4) Morales' plea agreement which contained a non-prosecution agreement
11 (ECF No. 249-4 at 2-15.); and (5) information that Morales provided about a mortgage
12 broker named Ernest Vigil, but not about a builder name Mr. Virgil, because Morales did
13 not provide any such information. (ECF No. 249-1 at 17-18; ECF No. 249-2 at 3-7, 16-
14 17.) The government denies that it had any secret agreement with Morales for him to act
15 as the government's agent as Wagner claims, and Wagner fails to offer any evidence
16 supporting his claim of a such an agreement.

17 The Court agrees with the government that Wagner has failed to offer any
18 evidence to support his allegation that the government failed to disclose the claimed
19 materials relating to Morales.

20 **3. Roma Nelson**

21 Wagner argues that the government failed to disclose that Nelson was an
22 undercover government agent. In particular, he claims that he recently learned of a
23 previous interview where Nelson had agreed to work as an undercover agent and that
24

25 ⁴Wagner cites to the government's list of recordings dated March 23, 2012, as
26 support. (ECF No. 235 at 9.) However, it is not clear from the list that the government
27 failed to produce these recordings during discovery in this case or that the list identified
28 recordings of conversations with Wagner. In fact, the government cites to the March 23,
2012, letter as support that it disclosed recordings between Morales and Gonzales, and
that the letter does not identify recordings between Morales and Wagner or between
Morales and others as Wagner contends. (ECF No. 249 at 5.)

1 she had made copies of his files and faxed them to Rawlins. (ECF No. 235 at 10.) In
2 support of his suggestion that Nelson had surreptitiously copied documents from his files
3 for the government in violation of his Fourth Amendment rights, Wagner points to the fact
4 that recently obtained documents copied from his private files contain the Wagner
5 Homes fax number as the sender and Rawlins' fax number as the recipient, in addition to
6 the fact that Wagner had discovered that his office copier had burnt out and "the meter
7 copies appeared to jump by +/- 2000 copies" a few days before Nelson quit her job,
8 though she professed to have no knowledge of either issue. (ECF No. 235 at 10.)
9 Wagner does not offer any information to substantiate his claim that Nelson had
10 purportedly copied documents and faxed them to Rawlins, or that she had any contact
11 with Rawlins while she worked for his company. Wagner's reply brief referenced an
12 "Exhibit 'A' first attached to the declaration of" Wagner showing the fax numbers of
13 Rawlins and Wagner's office (ECF No. 258 at 6), but no such document was attached to
14 the reply brief or to Wagner's declaration filed as part of Exhibit A (*id.* at 20-22), or to
15 Wagner's declaration intended to be attached with his Motion but actually filed on
16 November 6, 2015 (ECF No. 240). In his Response, Wagner offered a copy of a letter
17 signed by him dated May 26, 2009, which contains a fax number on the upper right hand
18 corner, although it is not evident from the document whether the fax number was that of
19 the sender or of the recipient, and the date of the fax is not legible. (ECF No. 268 at 12.)
20 The document contains a handwritten notation that the fax number is that of Rawlins,
21 although it is not clear who authored the handwritten note and whether the note is
22 accurate. It also appears that the letter was originally faxed on May 26, 2009, at 12:14
23 p.m. by means of an "HP Laserjet Fax" as noted on the letter to the upper left of the
24 Wagner Homes logo. The Court cannot find that this document contains the information
25 Wagner claims to be self-evident — that the document was faxed from Wagner Homes
26 to Rawlins before Nelson's employment termination from Wagner Homes in June 2009,
27 let alone that it was Nelson who faxed the document.

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1 The government denies that Nelson copied any documents for the FBI or that
2 Rawlins had any contact with Nelson before she quit working for Wagner Homes in June
3 2009, which was over a year before her first contact with the FBI. (ECF No. 249 at 7.)
4 The government further demonstrates that Nelson had been interviewed three times by
5 Rawlins, and all three 302s of these interviews were disclosed in discovery. (*Id.* at 8.)
6 Wagner does not dispute this fact or offer support for his claim of a prior undisclosed
7 interview as alleged in his reply brief. (ECF No. 258 at 6-7.) Instead, Wagner offered an
8 excerpt of a recording of a conversation between Pachinger and Nelson in the summer
9 of 2009 where Nelson said that Rawlins “used to call the office” and “would always ask
10 where is Paul.” (ECF No. 258 at 7.) However, such comments at best show Rawlins
11 would call Wagner Homes looking for Wagner, not that he had interviewed or contacted
12 Nelson to act as a government agent.

13 Wagner fails to offer any evidence to support his contention that the government
14 failed to disclose that Nelson was an agent of the government while she was employed
15 with Wagner Homes.

16 **4. Other Witnesses**

17 In his reply brief, Wagner argues for the first time that the government also failed
18 to disclose information showing the “truth character” of several important witnesses to
19 the jury, including the fact that they were alleged de facto agents or cooperating with the
20 government. (ECF No. 258 at 7-15.) However, as the government correctly pointed out,
21 *Brady* and *Giglio* do not impose an obligation on the government to disclose information
22 to the jury. In his Response, Wagner clarified that his argument is that the government
23 failed to disclose to the jury that these witnesses were de facto agents of the
24 government, and not as portrayed to be “unbiased independently minded witnesses.”
25 (ECF No. 268 at 6.)

26 Here again Wagner fails to offer any evidence to support his claim that Pachinger
27 and Weissbuch were de facto government agents. Instead, Wagner explains that an
28 attorney he had consulted with when he was informed by Rawlins that he was a target of

1 an FBI investigation suggested that some people Wagner had dealt with were
2 undercover agents or informants, but he has essentially not been able to obtain
3 information “as to which ‘neutral witnesses’ were actually undercover agents” and seeks
4 discovery and an evidentiary hearing to try to obtain this information. (ECF No. 240 at 2,
5 6.) The government also points out that evidence of the cooperation provided by
6 Pachinger and Weissbuch, including FBI 302s of interviews, their plea agreements and
7 recordings, were produced in discovery. (ECF No. 260 at 4.)

8 Wagner does not offer any evidence to support his contentions with respect to
9 Antonio — that the government concealed her past fraudulent conduct and recruited her
10 to set up Wagner. (ECF No. 258 at 14-15.) In his Response, Wagner appears to clarify
11 that his contention is the government should have pointed out during Antonio’s testimony
12 that she had participated in other fraudulent schemes, not that the government failed to
13 disclose these other bad acts during discovery. (ECF No. 268 at 5.) Indeed, two of the
14 exhibits that Wagner relies upon — Exhibits C and D — appear to be excerpts from a
15 302s for Antonio. (*Id.* at 16-18.) Again, *Brady* and *Giglio* do not impose an obligation on
16 the government to disclose information to the jury. Moreover, on cross-examination,
17 Antonio testified about some of the issues identified in Exhibits C and D, including her
18 shredding of documents involving cash-back payments when National Alliance Title
19 closed, creation of double escrows or double HUDs to conceal down payment
20 assistance for one mortgage broker (John Vidaurri), creation of sub-escrow accounts
21 when she was with Direct Title, and dealings with Anthony Horowitz. (ECF No. 150 at
22 67-84.) Antonio also testified on direct that she was prosecuted for conspiracy to commit
23 mortgage fraud involving Wagner Homes and The Carpenter’s Fund, sentenced to five
24 years of probation over the government’s objection and ordered to pay restitution and
25 forfeiture.⁵ (ECF No. 149 at 8-13.) Thus, even Wagner’s contention that the jury was not
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27 ⁵Exhibit B to the Response appears to be a copy of the Judgment from that
28 criminal case before The Honorable Philip Pro. (ECF No. 268 at 14.)

1 presented with Antonio's past fraudulent conduct is belied by the transcript of Antonio's
2 trial testimony.

3 The Court agrees with the government that Wagner has failed to offer any
4 evidence to support his contention that Pachinger, Weissbuch and Antonio were de facto
5 government agents and that Antonio had engaged in transactions with Wagner Homes
6 at the FBI's direction to entrap Wagner.

7 **5. Lawrence Semenza**

8 Wagner contends the government violated its *Brady* obligations by failing to
9 disclose that Semenza had an actual conflict in that Semenza was "under indictment for
10 tax evasion during the time of the Wagner trial, and was negotiating a disposition with
11 the AUSA."⁶ (ECF No. 235 at 12.) Wagner reasons that as a result of the government's
12 *Brady* violation, he was represented by conflict counsel in violation of his Sixth
13 Amendment rights. (*Id.*)

14 The government responds that Semenza was not being investigated by the U.S.
15 Attorney for the District of Nevada ("the Nevada U.S. Attorney's Office") during the
16 course of the trial in this case, and the Nevada U.S. Attorney's Office only learned of the
17 criminal investigation involving Semenza when the matter was referred to it by the Tax
18 Division of the United States Department of Justice ("DOJ Tax Division") on February 6,
19 2013, for prosecution ("the Referral Letter"). (ECF No. 249 at 8-9.) Wagner counters that
20 because the Referral Letter referenced a letter dated October 25, 2012, criminal
21 investigation into Semenza had been conducted and completed "sufficiently to enable
22 the special agent in charge[] to recommend prosecution of Semenza within 13 days of
23 Wagner's trial." (ECF No. 258 at 2.) This may be true. However, the October 25, 2012,
24 letter is from the Special Agent in Charge of the Las Vegas Field Office of the Criminal
25 Division of the Internal Revenue Service to the Assistant Attorney General for the DOJ
26

27 ⁶On August 28, 2014, Semenza waived indictment and pled guilty to three counts
28 of failure to file a tax return for the 2007-2009 calendar years. See *United States v.*
Semenza, Case No. 2:14-cr-00271-JCM-PAL (ECF Nos. 2, 5, 6).

1 Tax Division, not the Nevada U.S. Attorney's Office. (ECF No. 260-1) That letter does
2 not show that the Nevada U.S. Attorney's Office knew of the criminal investigation
3 involving Semenza. The government represents that the Nevada U.S. Attorney's Office
4 was not aware of the criminal investigation involving Semenza until the it received the
5 Referral Letter, which was about three months after the trial and a month after
6 Semenza's representation of Wagner terminated. Accordingly, the government argues
7 that the Nevada U.S. Attorney's Office did not violate any obligations to disclose any
8 conflict, or that Semenza had an actual conflict. (ECF No. 260 at 1-2.)

9 First and foremost, to the extent Wagner asserts that the newly discovered
10 evidence relates to Semenza's criminal investigation which rendered him ineffective in
11 representing Wagner, Wagner cannot rely on such evidence to support his Motion.⁷ In
12 *United States v. Hanoum*, the Ninth Circuit Court of Appeals held that "a Rule 33 motion
13 based upon 'newly discovered evidence' is limited to where the newly discovered
14 evidence relates to the elements of the crime charged. Newly discovered evidence of
15 ineffective assistance of counsel does not directly fit the requirements that the evidence
16 be material to the issues involved, and indicate that a new trial probably would produce
17 an acquittal." *Hanoum*, 33 F.3d 1128, 1130 (9th Cir. 1994). Thus, the fact that Semenza
18 was being criminally investigated by the IRS during Wagner's trial is not evidence
19 relating to any of the counts in this case to meet the first part of the *Harrington* five-factor
20 test.

21 Moreover, Wagner offers no evidence that the Nevada U.S. Attorney's Office
22 knew of the IRS's criminal investigation relating to Semenza during the course of
23 Semenza's representation of Wagner. To the contrary, the government has offered
24 evidence that the Nevada U.S. Attorney's Office who prosecuted Wagner was not aware
25

26 ⁷The Court does not reach the legal question of whether disclosure of the criminal
27 investigation relating to Semenza falls within the government's obligations under *Brady*
28 and *Giglio*. Wagner also suggests that Semenza should have disclosed his conflict —
that he was being criminally investigated by the IRS. (ECF No. 268 at 2-3.) But
Semenza's ethical duties cannot be imputed to the government.

1 of any such criminal investigation until the criminal matter was referred for local
 2 prosecution in February 2013 when Semenza no longer representing Wagner. Thus, the
 3 Nevada U.S. Attorney's Office cannot violate a duty to disclose a potential conflict of
 4 which it had no actual knowledge.⁸


5 **V. CONCLUSION**

6 The Court notes that the parties made several arguments and cited to several
 7 cases not discussed above. The Court has reviewed these arguments and cases and
 8 determines that they do not warrant discussion as they do not affect the outcome of the
 9 Motion.

10 Wagner fails to offer any evidence to support his contention that the government
 11 violated its duty under *Brady* and *Giglio* to disclose material information. Accordingly, the
 12 Court denies Wagner's motion for a new trial, as well as Wagner's request for discovery
 13 and an evidentiary hearing.

14 It is therefore ordered that Paul Wagner's motion for a new trial (ECF No. 235) is
 15 denied.

16 DATED THIS 26th day of January 2017.

17 
 18 _____
 19 MIRANDA M. DU
 20 UNITED STATES DISTRICT JUDGE

21 ⁸The government also relies on *United States v. Baker*, 256 F.3d 855, 859 (9th
 22 Cir. 2001), to argue that Wagner fails to show an actual conflict existed because
 23 Semenza was not under criminal investigation by the Nevada U.S. Attorney's Office who
 24 prosecuted Wagner. (ECF No. 260 at 2.) In *Baker*, the court reiterated that to
 25 demonstrate ineffective assistance of counsel, a defendant "must show 'that an actual
 26 conflict of interest adversely affected his lawyer's performance[.]'" and "not the mere
 27 possibility of conflict." *Id.* at 860 (quoting *United States v. Moore*, 159 F.3d 1154, 1157
 28 (9th Cir. 1998). The court found that Baker failed to make this showing of an actual
 conflict of interest because while representing him in in connection with a conviction and
 an appeal in the Central District of California, Baker's counsel was under investigation
 and cooperated with the United States Attorney in the Southern District of New York and
 earning a downward departure for substantial assistance. The Court does not reach the
 issue of whether Wagner has made a showing of ineffective assistance of counsel since
 the issue cannot be raised in a motion for a new trial under Rule 33(b). See *Hanoum*, 33
 F.3d at 1130.